Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Canadian Office and Professional Employees Union, Local 378,

applicant,

and

Canadian Freightways, a division of TFI Transport 7 L.P.,

respondent.

Board File: 30348-C
Neutral Citation: 2014 CIRB **722**
April 23, 2014

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Robert Monette and Norman Rivard, Members.

Counsel of Record

Mr. Patrick Dickie, for the Canadian Office and Professional Employees Union, Local 378;

Mr. David P. Negus, for Canadian Freightways, a division of TFI Transport 7 L.P.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

[1] Section 16.1 of the *Canada Labour Code (Part I–Indusirial Relations)* (*Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this application for interim relief without an oral hearing.

I. Introduction

[2] On March 4, 2014, the Canadian Office and Professional Employees Union, Local 378 (COPE), filed an application asking for an interim order under section 19.1 of the *Code*. The application for interim relief arises from two other ongoing matters: an application for a declaration of an unlawful lockout (Board file no. 30349-C) and a complaint of unfair labour practice (Board file no. 30350-C).

[3] COPE requested the immediate recall of certain employees laid off at the Edmonton operation of Canadian Freightways, a division of TFI Transport 7 L.P. (CF). CF contested the application for remedial relief.

[4] The Board has considered the parties' submissions, including their affidavit evidence, and has decided not to issue interim relief in the circumstances of this case. The Board will hold an oral hearing for COPE's two other ongoing matters.

[5] These are the Board's reasons.

II. Facts

[6] COPE is certified to represent CF's office employees. The bargaining unit's employees work in various geographic locales in Western Canada, including in Edmonton.

[7] The most recent COPE-CF collective agreement expired on December 31, 2013. COPE provided notice to bargain on January 15, 2014. The parties agreed to collective bargaining dates.

[8] On February 20, 2014, CF laid off certain employees in its Edmonton Accounts Receivable unit. The parties' affidavit evidence differed in several respects, including whether there had been any attempt to notify COPE of the layoffs in advance. Similarly, COPE pleaded that it received varying explanations of the reasons for the layoffs.

[9] CF pleaded that it had originally given erroneous information to COPE and later sought to correct that information.

[10] COPE has filed grievances contesting the layoffs, which have already been the subject of a bumping exercise under the collective agreement. COPE has also alleged in its other pending matters that CF has violated: i) the statutory freeze (section 50(*b*)); ii) the obligation to bargain in good faith (section 50(*a*)); and iii) certain unfair labour practice provisions (sections 94(1)(*a*) and 94(3)(*a*)).

[11] COPE further alleged that CF's actions constituted an unlawful lockout.

[12] CF contested the application for interim relief. It alleged that layoffs impacting COPE members, as well as members of other unions, had been taking place in recent years due to financial issues. Certain terminal closures had occurred following receipt of COPE's notice to bargain, but without any resulting complaints under the *Code*.

[13] It alleged that the layoffs had respected the collective agreement and that, in any event, a labour arbitrator would decide that particular issue.

[14] CF further commented that collective bargaining had commenced and that the number of laid-off employees represented only a small percentage of COPE's overall bargaining unit.

III. Analysis and Decision

[15] In 1999, the Legislator added section 19.1 to the *Code* to give the Board a broad discretion whether to issue interim relief:

> 19.1 The Board may, on application by a trade union, an employer or an affected employee, make any interim order that the Board considers appropriate for the purpose of ensuring the fulfilment of the objectives of this Part.

[16] The Board's expedited process, as set out in section 14 of the *Canada Industrial Relations Board Regulations, 2012*, applies to applications for interim orders:

> 14. An expedited process applies to the following matters:
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> (*a*) applications for interim orders made under section 19.1 of the *Code*;

[17] In *Trentway-Wagar Inc.*, 2000 CIRB 57, the Board commented on the broad test created by section 19.1:

> [21] The relevant section, 19.1, is new to the *Code*, having initially come into force on January 1, 1999. As a first point, **the Board does not view the decision of the previous panel as an indication that this statutory power to grant interim relief is one that should necessarily be delineated or limited by common law principles. The power should be interpreted and applied not as a common law power according to common law tests, but rather should be applied in a manner that reflects the intention and objectives of the statute.** This is particularly the case in respect of the interim power in section 19.1, because the section specifically directs that interim orders made pursuant to it are to be directed to fulfilling the objectives of the statute.

(emphasis added)

[18] In *Seaspan International Ltd.*, 2010 CIRB 513 (*Seaspan 513*), the Board noted how its analysis of an application for interim relief differed from the traditional criteria used by the courts in issuing interim orders:

> [39] In the course of that decision, the Board discusses the considerations that it sees as material in the fulfilment of the *Code*'s objectives. **In that and subsequent cases, the Board makes it apparent that it is not bound by the criteria usually used by the courts with respect to applications for interim orders and that the statutory criteria enacted by section 19.1 of the *Code* is both pragmatic and protective and must be applied based on the objectives of the *Code*, particularly with respect to maintaining an environment conducive to the development of sound labour relations.** Accordingly, in a labour relations context, fulfilling the objectives of the *Code* may sometimes require that certain interim measures be taken to ensure that the representative character of a union, and the collective interests of the employees it represents, are respected and maintained (see *TQS Inc.*, 2008 CIRB 434). In this regard, the Board observed:
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> > [27] ... interim relief may be aimed at stabilizing labour relations or, in other words, neutralizing the potential harm of an alleged labour practice complaint pending its final determination.

(emphasis added)

[19] In *Seaspan 513*, *supra*, an employer's actions had impacted the status quo for two competing trade unions when raids were possible:

[50] It is acknowledged and well understood that any interim order will impact upon the respondent's operations and its discretion respecting its manning or crewing decisions. **However, left otherwise, the respondent would remain free to use operational needs to arbitrarily alter the relative balance concerning the amount of bargaining unit work performed by each unit, and thereby undermine the representative character of the SIU. The potential labour relations harm and prejudice to the SIU if the bargaining unit work and manpower levels are reduced pending the determination of the complaints is evident.** It would impact upon the SIU's representation rights. On the other hand, to maintain the equitable balance that the respondent has attempted to maintain over the years since the previous Board decision until the complaints can be heard and determined would help to stabilize labour relations by maintaining the status quo and neutralize the potential harm to the rights of the SIU and its unit members in the interim.

[51] Consequently, **the Board is satisfied that an interim order is required from the Board to neutralize the potential harm of the alleged unfair labour practices and ensure that the attainment of the objectives of Part I of the *Code* are not compromised** while the Board deliberates on the merits of the underlying complaints.

(emphasis added)

[20] In *Transpro Freight Systems Ltd.*, 2008 CIRB 422 (*Transpro 422*), the Board issued interim relief following an employer's anti-union comments during an organizing campaign:

[51] While the extent and degree of Transpro's comments and actions remain to be determined when hearing the unfair labour practice complaint on the merits, Transpro does not deny that its owners expressed views to key employee organizers and Teamsters representatives which would cause a reasonable person to believe their employment was in jeopardy and that the business would be closed if they continued on their organizing path.

[52] While Transpro appears to have benefitted from the advice of experienced labour law counsel, and took some steps to modify its actions, the bell cannot be unrung. Even if Mr. Mohammed was not fired *de jure* once legal counsel had been consulted, the reality is that Mr. Mohammed was told he was fired by the owners of the company. The August 15, 2008 letter to employees about their rights goes beyond merely summarizing the employee's rights under the *Code*. That does not mean, however, that the Board has found that it violates the *Code*.

[53] **The purpose of an interim order is to ensure "the fulfillment of the objectives" of Part I of the *Code*. The Teamsters have persuaded the Board that it is appropriate to issue interim relief which ensures that Transpro's employees know of their freedoms under the *Code* and that they can explore these basic freedoms without fear of reprisal.**

[54] **However, the Board has not been convinced to order that terms and conditions of employment be maintained given that the issue of whether there has been a change has been hotly contested. It will be examined when the complaint is heard on the merits.** The Board retains extensive remedial authority depending on its conclusion as to the Teamsters' complaint on the merits. The Board, consistent with its past practice, will not award costs in this application for interim relief.

(emphasis added)

[21] In *3329003 Canada Inc. and Trentway-Wagar Inc.*, 2010 CIRB 493 (*Trentway 493*), the Board referred to *Transpo 442, supra*, and summarized some of the principles it considered for applications for interim relief:

> [23] In *Transpro Freight Systems Ltd.*, 2008 CIRB 422 (*Transpro*) the Board reviewed its jurisdiction to issue interim orders. The *Code* does not provide the same amount of guidance that the *Ontario Labour Relations Act, 1995* provides to the Ontario Labour Relations Board in terms of how and when it can issue interim relief.
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> [24] Rather, the Legislator preferred to grant the Board a wide discretion in section 19.1.
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> [25] The Board in *Transpro* reviewed some of the "objectives" in Part I of the *Code* such as the encouragement of free collective bargaining and the freedom of association.
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> [26] Every employee has the basic freedom to join a trade union. The *Code* does require, however, that a trade union demonstrate majority support in an appropriate bargaining unit in order to gain access to the *Code*'s rights and privileges. The Board grants such access when it certifies a trade union for a particular bargaining unit.
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> [27] The Board is wary of issuing prematurely interim orders which could have the unintended consequence of giving one party a privilege or an advantage to the detriment of another. However, doing nothing, where interim relief is justified, can easily prejudice a party which finds itself on an uneven playing field while it waits for the Board to hold a hearing and issue a decision on the merits of its application or complaint.

[22] In the instant case, the Board has decided that it will hold an oral hearing in order to hear each party's evidence about the contested events which started early in 2014. This oral evidence will allow the Board to consider COPE's various allegations regarding an alleged unlawful lockout as well as various unfair labour practices, including those specifically related to bargaining (section 50 of the *Code*).

[23] But COPE did not persuade the Board that this was an appropriate case for interim relief.

[24] While the Board did issue interim relief in *Transpro 422, supra*, and *Trentway 493, supra*, those cases also cautioned that interim relief should not be issued if it would give one party an advantage to the detriment of the other.

[25] In the instant case, the Board is satisfied that the objectives of the *Code* are already being met through a combination of grievances under the collective agreement, a process also governed by Part I of the *Code*, and the upcoming oral hearings into all of COPE's allegations.

[26] In the Board's view, those processes, which could lead to significant remedial orders, are sufficient to ensure the objectives of Part I of the *Code* are fulfilled. Moreover, the number of employees impacted by the contested measures represent a relatively small percentage of the employees in the bargaining unit.

[27] The Board dismisses COPE's application for interim relief and will be issuing a notice of hearing forthwith to determine the remaining matters.

[28] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

Robert Monette
Member

Norman Rivard
Member